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United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 270, FOOD AND DRUGS ACT.

ADULTERATION AND MISBRANDING OF MOLASSES.

On various dates extending from March 18, to August 1, 1908, C. E. Coe, of Memphis, Tenn., shipped from the State of Tennessee into the State of Arkansas 779 cases of molasses. Analysis of samples of this product made in the Bureau of Chemistry, United States Department of Agriculture, indicated that it was adulterated and misbranded within the meaning of the Food and Drugs Act of June 30, 1906. As it appeared from the findings of the analyst and report made that the shipments were liable to seizure under section 10 of the act, the Secretary of Agriculture reported the facts to the United States attorney for the Eastern District of Arkansas. In due course a libel was filed against the said 779 cases of molasses, charging that the product was adulterated within the meaning of the act in that glucose had been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength and had been substituted in part for the genuine article; and was misbranded within the meaning of the act, in that a part of said 779 cases were labeled in conspicuous type "Sugar Glen Open Kettle Sugar House Molasses absolutely pure. Highest grade sugar house Molasses," and inconspicuously printed across the face of the label in some cases and across the back in others, "Compound molasses and corn syrup," and that the remainder of said 779 cases were labeled conspicuously "Burro Sugar House Ribbon Cane Molasses," and inconspicuously printed across the face of the label in some cases and across the back in others, "Compound Molasses and Corn Syrup," which form of labelling was false, misleading, and deceptive, in that it conveyed the impression that the product was pure molasses and said impression would not be corrected by the words "Compound Molasses and Corn Syrup" inconspicuously printed across the face or back of the label, and praying seizure, condemnation, and forfeiture. An answer was filed by C. E. Coe, Memphis, Tenn., setting up a claim to the said 779 cases of molasses, and denying the adulteration and misbranding.

On November 7, 1908, the case came on for trial on the misbranding charge, the Government having abandoned the charge of adulteration, and after hearing the evidence, the court instructed the jury to return a verdict for the claimant. Subsequently the United States entered an appeal in this case and also filed a writ of error, and the case, in due course, coming on for hearing before the United States Circuit Court of Appeals for the Eighth Circuit, the court rendered its opinion sustaining the verdict of the lower court, in substance and in form as follows:

POLLOCK, *District Judge*, delivered the opinion of the court.

This is a libel of condemnation arising under the provisions of the Pure Food and Drug Law enacted by Congress June 30, 1906, and the regulations of the secretaries promulgated October 20, 1906, in pursuance of power conferred on them by section 3 of the act. The facts are:

One C. E. Coe, a merchant of the city of Memphis, Tennessee, at various dates between March 18 and August 1, 1908, sold and shipped the seven hundred and seventy-nine cases of molasses in controversy to certain wholesale jobbing houses in the city of Little Rock, Arkansas. Thereafter, on August 19th, the District Attorney for the District of Arkansas filed his libel of condemnation in which it was charged the molasses were both adulterated and misbranded in violation of the provisions of the act. A writ of seizure was issued and executed by the marshal, seizing, as shown by his return, six hundred and eighty-five cases of the molasses in question. Of the cases seized, as shown by his return, four hundred and sixty-four were what is labeled "sugar glen" molasses, and two hundred and twenty-one cases as "burro" molasses.

Thereafter, on September 21, 1908, by leave of Court, an amended libel of condemnation was filed in which it was charged the molasses contained in the cases were adulterated by the use of commercial glucose, mixed and packed with the molasses to such extent as to injuriously affect the quality and strength in violation of the law. And it was further charged, in substance, the cases were so labeled and misbranded as to convey the impression the contents of the cases were pure sugar house molasses, whereas, in truth, they were a compound of sugar molasses and corn syrup.

Thereafter, Coe filed his affidavit as claimant of the molasses and answered, setting up his guarantee to the purchasers under the terms of the act, denied the charges of adulteration and misbranding, attached as exhibit to his answer a copy of the label of each brand of molasses sold and delivered by him, and demanded a trial by jury, as provided by section 10 of the act, and gave a bond as provided in the act to secure possession of the molasses.

A trial by jury was had, at which, by direction of the Court, the jury returned a verdict in favor of the claimant on which a judgment was entered in his favor. From this judgment the government, being uncertain as to its rights, prosecutes its appeal in case No. 3024 and also prosecutes error in case No. 3030.

From the statement made it would seem quite plain the proceedings on the trial cannot be reexamined by this Court on the appeal taken. Section 10 of the act, among other matters, provides, as follows:

"That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district or insular possession to another for sale, or having been transported, remains unloaded, unsold or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel shall con-

form, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

The right to trial by jury granted by this act on demand of either party is absolute and means a trial by jury according to the established practice in courts of common law. Elliott *v.* Toeppner, 187 U. S. 327; Insurance Company *v.* Comstock, 16 Wall, 258; Parsons *v.* Bedford, 3 Pet. 433; Bower *v.* Holzworth, et al.,.138 Fed. 28; Duncan *v.* Landis, 106 Fed. 839; By Article VII of the Constitution it is provided:

"No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Mr. Justice Clifford, delivering the opinion of the Court in Insurance Company *v.* Comstock, supra, in commenting on this provision of the Constitution, said:

"Two modes only were known to the common law to re-examine such facts, to wit: the granting of a new trial by the court where the issue was tried or to which the record was returnable, or secondly by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted."

As a jury trial was demanded by the claimant in this case, and as such trial was had, the appeal taken in case No. 3024 must be dismissed because such method is inappropriate to review the proceedings had. It is so ordered.

At the trial the charge of adulteration was abandoned by the Government and it relied solely and alone on the charge of misbranding. As has been seen, at the conclusion of the evidence the Court charged the jury neither of the labels under which the cases of molasses were sold and shipped from Memphis to Little Rock was misleading nor constituted a misbranding, as that term is employed in the act, nor in regulation 17 promulgated by the secretaries under authority of the act. This action of the Court constitutes the sole ground of error relied upon to work a reversal of the judgment rendered in the case.

The only evidence adduced on the trial was that of the marshal who executed the writ of seizure and that of Geo. B. Spencer a government chemist from the Department of Agriculture. The marshal testified the cases of molasses seized by him bore labels identical with those attached to and made part of the answer of claimant, which labels were offered and received in evidence at the trial, as Exhibits A and B.

The witness Spencer testified he made a chemical analysis of the brands of molasses seized in this case; that the sugar glen brand contained 30% and the burro brand 40% of commercial glucose; that pure molasses contain no commercial glucose but do contain natural glucose; that neither natural nor commercial glucose is injurious or deleterious to health; that a large number of syrups on the market contain as high as 80% or 90% commercial glucose; that according to the practice and rulings of the Bureau of Chemistry of the Department of Agriculture the labeling or branding of commercial glucose, as "made from corn syrup" is permissible.

The provisions of the act prescribing what shall constitute a misbranding within its meaning, as applied to food products, are as follows:

"If it be labeled or branded so as to deceive or mislead the purchaser. * * * If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not

an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

Regulation 17 of the secretaries, (which has the effect of law) on the subject of misbranding, in so far as here thought applicable, provides:

"(a) The term 'label' applies to any printed, pictorial, or other matter upon or attached to any package of food or drug product, or any container thereof subject to the provisions of this act.

"(b) The principal label shall consist, first, of all information which the food and drugs act, June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words 'compound,' 'mixture,' or 'blend,' and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as 'artificially colored,' 'colored with sulphate of copper,' or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents are stated in terms of weight or measure, such statement should appear upon the principal label and must be couched in plain terms, as required by Regulation 29.

"(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the act shall not be smaller than 8-point (brevier) capitals: PROVIDED, that in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

"(d) Descriptive matter upon the label shall be free from any statement, design, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term 'design' or 'device' applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures, or names of substances."

If the labels in question be now compared with the provisions of the law above quoted, we find the first panel of each, and that contended by the claimant to be the principal label, to contain, first, the name of the substance or product; second, the place where manufactured or canned; third, words showing the article to be a compound; fourth, the words compound and ingredients; fifth, the name of the manufacturer or canner of the product; sixth, that it contains sulphur dioxide; seventh, that it is guaranteed under the Pure Food Act, serial No. 13,905, all as required by clause b of Regulation 17 above quoted. From a further examination of the labels it is found each in three places distinctly states the product to be a compound of molasses and corn syrup.

As shown from the evidence, this compound contains no substance deleterious or injurious to the health. And, as it further appears from the evidence, under the practice of the Department, commercial glucose may be properly labeled and sold under the name of "corn syrup," we are of the opinion there is nothing in the manner in which the cases of molasses involved in this controversy were labeled that is false or untrue, or which would tend to mislead or deceive a purchaser of ordinary prudence. And there is no evidence found in the record tending to show any one was so deceived or mislead by the labels employed.

The authorities relied upon by the government to make out the charge of false branding, as shown by an examination, are cases in which it was determined the labels contained false statements as to the contents of the receptacle labeled. Such cases, for the reasons given, are not applicable to the facts in the case at bar.

The direction of the Court to return a verdict in favor of the claimant was right and must be affirmed.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

Decisions of the United States District Courts and of United States Circuit Courts of Appeals adverse to the Government will not be accepted as final until acquiescence shall have been published.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *April 5, 1910.*

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